

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Whether respondent and/or the Kansas Workers Compensation Fund are entitled to a credit under K.S.A. 44-510a.
- (3) What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant is a forty-one (41) year old high school graduate, who began working for Boeing in 1986. Claimant worked several jobs for the respondent all involving repetitive motion activities with her hands, including gripping, grasping and some limited use of power tools. On September 7, 1989, while placing floor boards across a space in an aircraft where the floor had been removed, claimant's foot slipped causing both she and the board to fall into the hole. As she fell, she caught her left arm on some wiring, injuring her left shoulder. Claimant was seen at Boeing Central Medial and treated by Dr. VinZant and Dr. Fleming and was off work from the date of injury to January 4, 1990. At the time of claimant's return to work, she was having no problem with her shoulder and returned to her same job without restriction. Claimant suffered no permanent impairment as a result of this injury.

The Appeals Board finds that claimant suffered personal injury by accident arising out of and in the course of her employment on September 7, 1989, with said injury resulting in no permanent physical impairment to the claimant.

Claimant continued to work without difficulty until April 4, 1990, when she tripped over a ladder falling and catching herself with her arms. She again suffered injury to her left shoulder and suffered temporary injury to other areas of her body as well, and was off work from April 5 through July 15, 1990. Claimant was treated by Dr. Fleming and returned to work with restrictions of no overhead work. Claimant returned to her same job for a brief period, but was soon moved to the floor beam job. During this time, Dr. Fleming added the additional restriction of no power tools and claimant was assigned to the job of shop runner. This job required she drive a scooter around the plant. In January 1991, claimant was transferred to the work pool. Initially, she was assigned to sweeping floors, but was later transferred to a job which required she vacuum upholstered chairs. While performing these duties she developed pain in her hands, with her left hand first becoming symptomatic, followed shortly thereafter by her right.

During April and May 1991, claimant was sent to various doctors by the respondent for evaluation of her problems. She was diagnosed as possibly having early arthritis, overuse syndrome, tendinitis, and lupus. EMG studies and nerve conduction studies were negative. Claimant returned to the work pool until February 1992, emptying trash, dusting cabinets and washing telephones. Her overuse syndrome gradually progressed until, in February 1992, claimant was taken off work after being diagnosed with bilateral carpal tunnel syndrome.

Claimant was referred to Dr. Paul Lesko, a board certified orthopedic surgeon, who performed right carpal tunnel surgery on February 26, 1992, and left carpal tunnel surgery in May 1992. Claimant was paid temporary total disability and returned to work August 4, 1992. Claimant's return to work was in the burr shop in Warehouse No. 3, which, while not

being an easy job, was an accommodation to claimant's physical limitations. She was allowed to take rests as needed and change from job to job depending upon how her hands felt at the time. Claimant continued in this capacity until October 12, 1993, at which time she was laid off. This lay off was due to a reduction in work force with respondent. There was no indication from the evidence that claimant's condition progressed after her return to work between August 4, 1992 and her lay off October 12, 1993 and, as such, the Appeals Board finds claimant suffered personal injury by accident each and every day up through and including February 25, 1992, when claimant was taken off work due to her bilateral upper extremity injuries.

Claimant was examined by Dr. Ernest Schlachter who found claimant had suffered a five percent (5%) permanent partial disability to the body as a whole as a result of her April 4, 1990 left shoulder injury. He restricted claimant from lifting over twenty to twenty-five (20-25) pounds with the left arm and advised against work above horizontal, and repetitive pushing and rotatory motions with the left arm. Dr. Schlachter also evaluated claimant's bilateral upper extremity problems diagnosing claimant with overuse syndrome. He further restricted claimant from repetitive pushing, pulling, twisting or grasping with either hand or arm and advised against the use of vibratory tools and working in cold environments and restricted claimant from lifting over twenty (20) pounds with either hand. He rated claimant at ten percent (10%) to each upper extremity which converts to a six percent (6%) whole body impairment which, when combined, equals a twelve percent (12%) functional impairment of the body as a whole for claimant's bilateral upper extremity injuries.

Claimant was also examined by Dr. Kenneth Dale Zimmerman, a Boeing company doctor since June 1960. Dr. Zimmerman also assessed claimant a five percent (5%) functional impairment because of the April 1990 left shoulder injury and a ten percent (10%) functional impairment to each upper extremity due to the bilateral upper extremity injuries suffered with respondent. His combined ratings total a fifteen percent (15%) whole body functional impairment. Claimant was restricted from overhead work with the left arm with permanent limitations to the upper extremities involving no lifting over thirty to thirty-five (30-35) pounds and no use of power tools.

K.S.A. 1992 Supp. 44-510e(a) provides:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Subsequent to claimant's April 1990 injury to her left shoulder, claimant returned to work with Boeing in an accommodated position and continued to work at a comparable wage until suffering injuries to her bilateral upper extremities. As such, the Appeals Board finds that the presumption contained in K.S.A. 1992 Supp. 44-510e(a), has not been overcome and claimant is entitled to a functional impairment only as a result of the April 4, 1990 injury.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Both Dr. Zimmerman and Dr. Schlachter found claimant to have suffered a five percent (5%) whole body functional impairment as a result of her injury to her left shoulder and the Appeals Board awards same to claimant for the injury suffered on April 4, 1990.

Claimant was returned to work after her bilateral carpal tunnel surgery on August 4, 1992. She continued working at a comparable wage until shortly before her lay off on October 12, 1993. The Appeals Board finds claimant did return to work for wages comparable to her average gross weekly wage during this period of time and, as such, is entitled to a functional impairment only. Claimant has failed to rebut the presumption found in K.S.A. 1992 Supp. 44-510e for the period August 4, 1992 through October 12, 1993. Claimant was further assessed functional impairments by both Dr. Schlachter and Dr. Zimmerman for her bilateral upper extremity conditions which equate to a twelve percent (12%) whole body functional impairment. The Appeals Board finds when combining claimant's upper extremity impairment to the five percent (5%) shoulder impairment that, for this period, claimant is entitled a functional impairment of sixteen percent (16%) to the body as a whole. See Lee v. Boeing, Docket No. 157,744 (April 29, 1994).

After suffering injury to her bilateral upper extremities and subsequent to her lay off in October 1993, claimant was referred to two vocational rehabilitation experts for an assessment of her loss of access to the open labor market and loss of ability to earn a comparable wage. Respondent referred claimant to Mr. Maurice Entwistle, a rehabilitation counselor in Leawood, Kansas. Mr. Entwistle, in evaluating upper extremity repetitive motion situations, assesses a standard twenty-five percent (25%) reduction in a person's ability to perform work in the open labor market. He was also asked to discuss labor market access loss when dealing with specific weight limitations upon claimants. He advised when dealing with weight limitations of thirty to thirty-five (30-35) pounds claimant would have a thirteen percent (13%) loss of access to the open labor market. If the weight restriction was changed to twenty (20) pounds, it would create a twenty-six percent (26%) loss of access to the open labor market.

Mr. Entwistle testified claimant had a post-injury wage capability of \$9.50 per hour. This equates to a weekly wage of \$380.00. When compared to claimant's average weekly wage of \$732.93, this would equate to a fifty-two percent (52%) loss of ability to earn a comparable wage.

Claimant was also examined at her attorney's request, by Mr. Jerry Hardin. Mr. Hardin found, based upon Dr. Schlachter's restrictions, that claimant had suffered a forty to forty-five percent (40-45%) loss of access to the open labor market, with his computer program, Labor Market Access Plus, computing the loss at fifty percent (50%). When dealing with Dr. Lesko's restrictions, claimant's loss of access to the open labor market was thirty to thirty-five percent (30-35%). Mr. Hardin testified claimant had a post-injury wage capability of \$320.00 per week which, when compared to claimant's average weekly wage of \$732.93, equals a loss of ability to earn a comparable wage of fifty-seven percent (57%).

The Appeals Board used the post-injury wage earning capability evidence of Mr. Entwistle and Mr. Hardin and compared same to the actual average weekly wage earned by claimant while employed at Boeing, including post-lay off fringe benefits in determining a fifty-four and one-half percent (54.5%) loss of ability to earn comparable wages. While these numbers do not compare with the percentages presented by Mr. Entwistle and Mr. Hardin, they do accurately reflect claimant's loss of ability to earn a comparable wage.

In a workers compensation situation, claimant has the burden of proving the claimant's right to an award of compensation by proving the various conditions upon which claimant's right to a recovery depends, by a preponderance of the credible evidence. See K.S.A. 44-501(a) and K.S.A. 44-508(g).

The Appeals Board finds claimant has proven by a preponderance of the credible evidence that she has suffered a work disability subsequent to her lay off on October 13, 1993 and the presumption contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. The Appeals Board has held in prior cases that when an injured worker is laid off from employment, in certain circumstances, the presumption of no work disability may be overcome and claimant may become entitled to a work disability subsequent to the lay off. See Lee v. Boeing, Docket No. 155,744 (April 29, 1994).

In assessing work disability, the Appeals Board is required by K.S.A. 44-510e to assess how claimant's loss of access to the open labor market and loss of ability to earn comparable wages has been reduced. The Supreme Court, in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), found that giving equal weight to each of these factors was an appropriate method of computing work disability. The Appeals Board finds no compelling reason to give greater weight to one factor over the other in this matter and assesses equal weight to each. In reviewing the opinions of Mr. Hardin and Mr. Entwistle, the Appeals Board finds claimant has suffered a thirty-seven and one-half percent (37.5%) loss of access to the open labor market. In comparing the wage opinions of Mr. Hardin and Mr. Entwistle, the Appeals Board finds claimant has suffered a fifty-four and one-half percent (54.5%) loss of ability to earn comparable wages. In applying equal weight to both factors per Hughes, the Appeals Board finds claimant has suffered a work disability of forty-six percent (46%) as a result of the injuries suffered to her bilateral upper extremities and her left shoulder subsequent to her lay off of October 13, 1993.

K.S.A. 44-510a states in part:

"(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury."

The Appeals Board awarded claimant a five percent (5%) functional impairment to the left shoulder as a result of injuries suffered April 4, 1990. The Appeals Board finds that claimant's left shoulder injury did contribute to claimant's sixteen percent (16%) functional impairment and to the claimant's overall work disability suffered subsequent to her lay off after October 12, 1993, and the respondent and Workers Compensation Fund are entitled to a credit pursuant to K.S.A. 44-510a for one-hundred percent (100%) of all monies expended for any weeks overlapping between the injury suffered to claimant's left shoulder and her subsequent bilateral upper extremity injuries.

The Appeals Board is next asked to assess the liability of the Kansas Workers Compensation Fund.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers wholly,

or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a work-related injury. An employee is handicapped under the Act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

K.S.A. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In the instant case, the medical evidence establishes claimant suffered no permanent functional impairment after her first shoulder injury and was not handicapped as defined under the statute. When claimant suffered the second shoulder injury, it did result in a five percent (5%) permanent impairment of function. Claimant was also assessed certain restrictions as a result of that injury by the treating physician. Claimant later suffered bilateral upper extremity injuries, which Dr. Schlachter testified claimant would not have developed but for the left shoulder injury. Dr. Zimmerman also testified to a relationship between the left shoulder problem and the subsequent carpal tunnel syndrome, opining claimant would not likely have developed the carpal tunnel syndrome on either side but for the shoulder injury.

The Appeals Board finds that under K.S.A. 44-567a(a)(1) the upper extremity problems suffered by claimant probably or most likely would not have occurred but for the preexisting physical impairment of claimant's left shoulder. The Appeals Board further finds that claimant's work disability in this matter stems, in part, from claimant's second shoulder injury for which the Fund has no liability and, in part, from the bilateral carpal tunnel syndrome for which the Fund is assessed one-hundred percent (100%) liability. As such, it would not be fair to assess the entire work disability in this matter to the Kansas Workers Compensation Fund.

In computing the percentage of work disability assessable to either injury, the evidence in the record provides little guidance for the Appeals Board. Functional impairment has, in the past, been used to decide overall work disability when dealing with fund issues. The claimant was assessed a five percent (5%) whole body impairment to the left shoulder by both Dr. Schlachter and Dr. Zimmerman. Both doctors assessed an additional ten percent (10%) functional impairment to each upper extremity for the bilateral upper extremity, overuse symptomatology. The American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition Revised, Table 3, Page 16, equates a ten percent (10%) upper extremity impairment to a six percent (6%) whole person impairment. The combined values chart in the same publication, Page 254, combines two, six percent (6%) whole body impairments into a twelve percent (12%) whole body impairment. In comparing the twelve percent (12%) whole body functional impairment from

claimant's upper extremity injuries with the five percent (5%) whole body functional impairment from claimant's left shoulder, the Appeals Board finds claimant has suffered a sixteen percent (16%) whole body functional impairment as a result of her combined injuries. In finding the Workers Compensation Fund responsible for the upper extremity symptomatology which claimant would not have suffered but for her preexisting shoulder injury, the Appeals Board further finds the Fund responsible for sixty-eight and three-quarters percent (68.75%) of claimant's work disability suffered subsequent to October 12, 1993. The remaining thirty-one and one-quarter percent (31.25%) of claimant's overall work disability is the responsibility of the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated May 6, 1994, should be, and hereby is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debra L. Doherty, and against the respondent, The Boeing Company, and its insurance carrier, AETNA Casualty & Surety Company, for a 5% whole body functional impairment stemming from claimant's injury suffered on April 4, 1990, to her left shoulder. Based on an average weekly wage of \$643.01, claimant is entitled 14.57 weeks (4/5/90 - 7/15/90) temporary total disability compensation at the rate of \$271.00 per week totaling \$3,948.47, followed by 169.29 weeks (7/16/90 - 10/12/93) permanent partial general body functional impairment at the rate of \$21.43 per week totaling \$3,627.88, followed by 231.14 weeks (10/13/93 - 03/19/98) permanent partial general body functional impairment based upon an average weekly wage of \$732.93 at the rate of \$24.43 per week, totaling \$5,646.75, for a total award of \$13,223.10.

As of June 20, 1995, claimant would be entitled to 14.57 (04/05/90 - 07/15/90) weeks temporary total disability compensation at the rate of \$271.00 per week totaling \$3,948.47, followed by 169.29 (07/16/90 - 10/12/93) weeks permanent partial general body functional impairment at the rate of \$21.43 per week, totaling \$3,627.88, followed by 88 weeks (10/13/93 - 06/20/95) permanent partial general body functional impairment at the rate of \$24.43 per week in the sum of \$2,149.84, totaling \$9,726.19 to be paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 143.12 weeks (06/21/95 - 03/18/98) permanent partial general body functional impairment at the rate of \$24.43 per week, in the sum of \$3,496.91, until fully paid or until further order of the Director.

Claimant is further entitled to an award against the respondent, The Boeing Company, and its insurance carrier, AETNA Casualty & Surety Company, and the Kansas Workers Compensation Fund for an award stemming from claimant's bilateral upper extremity carpal tunnel with an injury date of February 25, 1992 and based upon an average weekly wage of \$643.01 for a 46% work disability. Claimant is awarded 22.86 weeks (02/26/92 - 08/04/92) temporary total disability compensation at the rate of \$289.00 per week, totaling \$6,606.54, followed thereafter by 62 weeks (08/05/92 - 10/12/93) permanent partial general body disability, based upon an average weekly wage of \$643.01 and minus the applicable K.S.A. 44-510a credit of \$21.43, at the reduced rate of \$47.16 per week totalling \$2,923.92 followed by, 231.14 weeks (10/13/93 - 03/18/98) permanent partial general body disability based on an average weekly wage of \$732.93 and minus the applicable K.S.A. 44-510a credit of \$24.43, at the reduced rate of \$200.34 per week, totaling \$46,306.59, followed thereafter by 99 weeks (03/19/98 - 02/08/00) permanent

partial general body disability at \$224.77 per week based upon an average weekly wage of \$732.93 in the sum of \$22,252.23, making a total award of \$78,089.28.

As of June 20, 1995, there is due and owing claimant 22.86 weeks (02/26/92 - 08/04/92) of temporary total disability compensation at the rate of \$289.00 per week or \$6,606.54, followed by 62 weeks (08/05/92 - 10/12/93) of permanent partial disability compensation at the reduced rate of \$47.16 per week in the sum of \$2,923.92, followed by 88 weeks permanent partial general body disability (10/13/93 - 06/20/95) at the reduced rate of \$200.34 per week in the sum of \$17,629.92, for a total of \$27,160.38, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$50,928.90 is to be paid for 143.14 weeks (06/21/95 - 03/18/98) at the reduced rate of \$200.34 per week in the sum of \$28,676.67, followed by 99 weeks permanent partial general body disability (03/19/98 - 02/08/00) at the rate of \$224.77 per week in the sum of \$22,252.23, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund shall reimburse respondent and its insurance carrier for all monies expended for the care and treatment of claimant's bilateral upper extremity problems and shall further be responsible for claimant's temporary total disability of 22.86 weeks and the 62 weeks permanent partial general body functional disability through October 12, 1993. Thereafter, the Fund shall be responsible for 68.75% of the funds expended for claimant's permanent partial general body work disability.

Claimant is further entitled to unauthorized medical up to the statutory maximum.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent, its insurance carrier and the Workers Compensation Fund to be paid 31.25% by the respondent and 68.75% by the Workers Compensation Fund as follows:

Don K. Smith & Associates	
Deposition of Maurice Entwistle	\$287.25
Deposition of Kenneth Dale Zimmerman, M.D.	\$271.75
Barber & Associates	
Transcript of Regular Hearing	\$292.60
Kelley, York & Associates, Ltd.	
Deposition of Ernest R. Schlachter, M.D.	\$233.55
Deposition of Jerry D. Hardin	\$425.55

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Tom E. Hammond, Wichita, Kansas
Eric K. Kuhn, Wichita, Kansas
Marvin R. Appling, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
David A. Shufelt, Acting Director